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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-255 ~~1799~~

UNITED STATES OF AMERICA,

Respondent,

versus

CRAIG WARNER, APRIL COVEY, SAMUEL L. KRANZTHOR, FRED W. DANIELS, JR., FRIEDA E. EDWARDS, FRANK DANIELS, and MICHAEL A. JACOBSON,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. _____

UNITED STATES OF AMERICA,
Respondent,

versus

CRAIG WARNER, APRIL COVEY, SAMUEL L. KRANZTHOR, FRED W. DANIELS, JR., FRIEDA E. EDWARDS, FRANK DANIELS and MICHAEL A. JACOBSON,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, CRAIG WARNER, APRIL COVEY, SAMUEL L. KRANZTHOR, FRED W. DANIELS, JR., FRIEDA E. EDWARDS, FRANK DANIELS and MICHAEL A. JACOBSON, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on April 8, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears Appendix

A, infra, pp. 1a. A petition for rehearing and petition for rehearing en banc, which was timely filed in the United States Court of Appeals for the Fifth Circuit, was denied without opinion. The denial appears at Appendix B, pp. 27a. The case at bar is an appeal from the United States District Court for the Western District of Texas, El Paso Division; no opinion was written by the trial court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 8, 1971. A petition for rehearing and petition for rehearing en banc was timely filed. On May 10, 1971, the petition was denied by the United States Court of Appeals for the Fifth Circuit. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

All of the petitioners were convicted for a conspiracy to violate 21 U.S.C. §176(a) and petitioner SAMUEL L. KRANZTHOR was also convicted for the actual violation of 21 U.S.C. §176(a). The questions thereby arising are:

1. Whether or not 21 U.S.C. §176(a), under which the indictment was brought and petitioners convicted, is Unconstitutional as violative of the Fifth Amendment privilege against self-incrimination.

2. Whether or not the decision of the United States Court of Appeals for the Fifth Circuit, through the use of the conspiracy statute and its statement on circumstantial evidence, circumvents this Court's decision in the case of *Leary v. United States*, 1969; 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532, insofar as the *Leary* case deals with the presumption of importation. In this respect, your petitioners would show this Honorable Court that in a prosecution for conspiracy to violate 21 U.S.C. §176(a), the presumption of importation exists if the court allows the evidence presented in the case at bar to be sufficient to prove importation beyond a reasonable doubt.

3. Whether or not the government is using the conspiracy statutes in prosecutions for violations of 21 U.S.C. §176(a) as a tool or means of convincing individuals and associates of anyone found in the possession of a large quantity of marihuana. Petitioners would respectfully show this Honorable Court that a situation exists within this Country that circumvents the *Leary* decision in that if a large amount of marihuana is introduced into evidence at the trial of a case involving a violation of 21 U.S.C. §176(a), it is impossible for a defendant, without testifying on his own behalf in a circumstantial evidence case, to receive a fair trial if the appellate court's decision is to be the law of the land because the amount of evidence needed to convict on a conspiracy to violate this statute becomes minute.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

STATUTES INVOLVED

21 U.S.C. §176(a):

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.00. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.00.

"Whenever on trial for a violation of this sub-section, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are found in the transcript and summarized as viewed most favorably from the government's position in this case by United States Court of Appeals for the Fifth Circuit (Appendix A, pp. 7 - 15), and that such interpretation of the facts is in a light most favorable to the government.

In addition to the facts as stated in the court's opinion, your petitioner APRIL COVEY would point out to the Court that she was never seen in the company of any of the other petitioners, except CRAIG WARNER, and then only at the time of their arrest in the United States; she was never seen in his company in Mexico; and the most damaging piece of evidence against her was a receipt indicating that in Guadalajara, Mexico, on March 10, 1969, she exchanged $510.00 for Mexican money.

Your petitioner CRAIG WARNER would show this Honorable Court that in addition to the facts as stated by the United States Court of Appeals for the Fifth Circuit, he was never seen in Mexico or in the company of the other petitioners in Mexico. The most

damaging bits of evidence was a hotel bill dated March 13, 1969, indicating the payment of 300 pesos to a motel in Yucatan, Mexico, for two persons for three days; and a repair bill from Yucatan, Mexico, dated March 15, 1969.

In addition to the facts as stated by the United States Court of Appeals for the Fifth Circuit, your petitioner FRIEDA E. EDWARDS would point out to the Court that she was seen in the company of two unidentified persons, in Mexico, with a car-top carrier on her Volkswagen sedan which car-top carrier vanished. Later it was shown that a similar car-top carrier was found containing marihuana. Never was it shown that petitioner FRIEDA E. EDWARDS had the car-top carrier loaded with anything, much less marihuana, in the Country of Mexico, and there is certainly no indication given by the testimony as to what the car-top carrier may have contained when seen in Mexico and certainly no indication as to the petitioner FRIEDA EDWARDS' knowledge of what may or may not have been in the car-top carrier.

In addition to the facts as stated by the United States Court of Appeals for the Fifth Circuit, your appellant, MICHAEL A. JACOBSON would show this Honorable Court that he attended an alleged meeting at a cafe, in Mexico, where no conversation was overheard, with other of the co-petitioners and was later arrested in the United States. In MICHAEL A. JACOBSON's vehicle were found some plastic bags similar to those containing the marihuana. In this respect, your petitioners would respectfully point out that the court

dismissed the charges against MICHAEL YOUNG, one of the original defendants in this case, who was arrested with MICHAEL JACOBSON, as stated in facts set out by the United States Court of Appeals for the Fifth Circuit. Petitioners would point out that MICHAEL YOUNG was also seen in the presence of some of the petitioners in Mexico and that there is no valid reason why the evidence could be insufficient as to him and insufficient as to the other petitioners.

In addition to the facts as stated by the United States Court of Appeals for the Fifth Circuit, your appellant FRANK DANIELS would show this Honorable Court that the only testimony concerning him was that he was seen in the Country of Mexico with some of the co-petitioners, talking. Never was he seen to do anything illegal, unlawful or suspicious. The keys allegedly found in a jacket which he wore on the night of his arrest which fit some of the suitcases containing the marihuana was the final link to him.

In addition to the facts stated by the United States Court of Appeals for the Fifth Circuit, your petitioner FRED W. DANIELS, JR. would show this Honorable Court that the only evidence against him was a remark he made to a cab driver which allegedly started the whole investigation, the remark being: "I thought those inspectors were real smart." Such remark was testified to by the cab driver in Spanish and there was some controversy as to the English translation. He was then seen at the cafe in Juarez, Mexico, talking to some of the co-petitioners and other than these

related incidents was not heard to say anything or seen to do anything suspicious,

Your petitioner SAMUEL L. KRANZTHOR was admittedly in the truck, in the United States, which contained the contraband introduced into evidence in this case. However, petitioners would strenuously urge this Court to read the statement of facts as set out by the United States Court of Appeals for the Fifth Circuit for the purpose of ascertaining that although all of the appellants were followed and watched by United States Customs Agents continuously in the Country of Mexico and the United States, that none of the marihuana, later found in the truck in the United States, was ever seen in Mexico; nor any of the containers in which the marihuana was found, was ever seen in Mexico; nor was there any testimony showing that the marihuana was imported from Mexico.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the Due Process Clause and the Fifth Amendment principles enunciated in this Court's decision in LEARY V. UNITED STATES, 1969, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532.

In the *Leary* case, this Honorable Court held that the tax count of 26 U.S.C. §4744(a)(1) was Unconstitutional as violative of the defendant's Fifth Amendment Rights. The reasoning of this Honorable Court in that case was that the signing of the necessary forms and the payment of the taxes on the importation of marihuana was an admission of the possession of mari-

huana. The Court accepted the fact that the possession of marihuana was a crime in every State of the Union. Although 21 U.S.C. §176(a) is no longer the law of the land, because it has been superceded by various laws concerning the smuggling, possession and importation of marihuana and other narcotics, your petitioners herein face severe prison sentences for violation of this law. Your petitioners would respectfully show this Honorable Court that if this Court intends to follow the reasoning of the doctrines espoused in *Leary v. United States,* 1969, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532; *Grosso v. United States,* 1968, 390 U.S. 62, 19 L.Ed.2d 906, 88 S.Ct. 709; and *Marchetti v. United States,* 1968, 390 U.S. 39, 19 L.Ed.2d 889, 88 S.Ct. 697, then this Court must strike down the provisions of 21 U.S.C. §176(a) as being Unconstitutional for the same reasons. There are other statutes which require an admission or acknowledgment of an act allowed by the Federal government which is against State law and the same reasoning would apply to these statutes. The Court's refusal to grant a writ of certiorari in the case at bar would be to allow citizens of this Country to be incarcerated under a statute which provides for the same self-incrimination as that objected to in the *Leary, Grosso,* and *Marchetti* cases. Petitioners would respectfully point out to the Court that prior to May 1, 1971, the importation was not forbidden by the United States Government. The forbidden act was the importation "contrary to law". The statute on its face therefore allows such importation if the marihuana is properly declared and invoiced. To properly declare and invoice marihuana, would be just as damning an admission of possession of marihuana as would be

the payment of the tax and the signing of the invoices which were struck down in the *Leary* decision. In view of the Court's constant refusal to grant certiorari to settle once and for all the exact meaning of the *Leary, Grosso* and *Marchetti* decisions, the appellate courts are not applying the reasoning of the cases to other statutes, but are only declaring the exact statutes which were the subject of the three cases cited above to remain Unconstitutional. Any other statute that the United States Government has, which on its face involves self-incrimination, will be allowed to be the basis of a prosecution unless and until this Court states clearly and unequivocably its meaning as stated in *Leary, Grosso* and *Marchetti* decisions.

Petitioners admit that the Ninth Circuit and the Fifth Circuit have continuously held that the reasoning of *Leary* does not apply to 21 U.S.C. §176(a). However, their method of reaching this conclusion is totally inconsistent with this Court's reasoning in *Leary*, and, in fact, inconsistent with the reasoning of each other. The Ninth Circuit reaches its decision in failing to strike down the statute by the following method of reasoning:

> "The appellant reasons that a person bringing marihuana into the United States must smuggle it in, because to invoice it and present it for inspection would provide a 'link in the chain' of evidence tending to establish his guilt, and would violate his Fifth Amendment privilege against self-incrimination. There is about as much logic in that reasoning as there

> would be in the contention of a bank robber that he was required to shoot the bank guard who ordered him to drop his gun and raise his hands, because to comply with the guard's orders would be self-incriminating and would provide a 'link in the chain' of evidence tending to establish his guilt, all in violation of his Fifth Amendment privilege against self-incrimination. The same claim might be made by the burglar who is accosted by a police officer as he crawls out of the window of a residence at three A.M. and is ordered to submit to an inspection of the luggage he is carrying. To hold that the privilege was available in any of these cases would border on the ridiculous and would effectively frustrate all criminal laws." *Witt v. United States*, 1969, 413 F.2d at 305, 306.

Petitioners would respectfully point out that that same kind of reasoning could be used in allowing the tax count as struck down in *Leary* to remain in full force and effect. It is obvious from the Ninth Circuit's reasoning that the courts are failing completely to follow *Leary* or to distinguish it in any manner.

Surprisingly enough, the Fifth Circuit reaches its decision in failing to strike down the statute by another type of reasoning, nowhere near the reasoning of the Ninth Circuit, but arriving at the same result, as evidenced by the following decision:

> "[I]n *Grosso* and *Marchetti* the defendants were convicted of failing to pay taxes to the United States on activities which the States had declared to be illegal. The United States made its tax records available to the states. Therefore compliance with the Federal wagering tax statutes meant incrimination at the State level. But compliance with 21 U.S.C. §176a precipitates no such incrimination. Had Walden declared and invoiced the marihuana at the border, it would have been immediately seized by Customs. At that point Walden would not have been vulnerable to prosecution, either Federal or State, because he would have complied with the Federal law and he would have never reached the State of Texas with marihuana in his possession." *Walden v. United States*, 1969, 417 F.2d at 700.

The Fifth Circuit, therefore, reads into the statute the right of United States Customs service to seize the marihuana if it is declared and invoiced, and therefore a citizen is now found in the paradox of viewing a statute which says he may import marihuana as long as he does not do so contrary to law, but that at such time that he complies with the law on the importation of marihuana, that the same will be taken from him.

Petitioners would respectfully suggest that the reasoning of the United States Court of Appeals for the Fifth Circuit in failing to strike down 21 U.S.C. §176(a) is inconsistent with the reasoning in the *Leary* decision and in fact, presupposes, without benefit of statute or

court decision, that Customs officials would have the right to seize at will marihuana which had been properly declared and invoiced.

Petitioners would respectfully point out to this Court, that this Court has repeatedly declared that if the United States Government allows an act to be done, which is in violation of State law, and to perform such act allowed by the United States Government requires the disclosing, in writing, of the name of the person doing the act, then the statute of the United States requiring this disclosure is Unconstitutional in that it violates the participants' Fifth Amendment privilege because it subjects him to prosecution under State law. Petitioners cannot conceivably think of any situation more severe than the declaring and invoicing requirements of 21 U.S.C. §176(a) and certainly cannot think of any statute of this government so contrary to reasoning in this Court's decisions in *Leary, Grosso* and *Marchetti,* as 21 U.S.C. §176(a).

The importance of the Court granting certiorari in this case is that the decisions in *Leary, Grosso,* and *Marchetti* need clarification as evidenced by the reasoning of the United States Court of Appeals for the Fifth and Ninth Circuits in attempting to follow them. By granting certiorari, this Court would be able to further solidify the reasoning used by this Court in striking down the statute in *Leary, Grosso,* and *Marchetti.* If the reasoning does not apply to 21 U.S.C. §176(a) or statutes similar to 21 U.S.C. §176(a), then the Court should clearly and concisely distinguish the reasoning. Thusly, the lower courts would be better able to fol-

low such reasoning and comply with the decisions of this Court in future cases involving United States statutes which require self-incrimination.

If this Court refuses to grant certiorari, then the only statutes under which this Country's citizens will be protected against self-incrimination are the statutes in *Leary, Grosso* and *Marchetti.* Even though other statutes may be equally violative and harsh, as far as their Fifth Amendment Rights are concerned, they will continue to be convicted and serve sentences for their violation. Petitioners respectfully submit that under no logical reasoning can 21 U.S.C. §176(a) survive in light of the case of *Leary v. United States,* supra.

2. The decision below, in view of the evidence as stated by the United States Court of Appeals for the Fifth Circuit and restated in appellants' petition for writ of certiorari, allows the presumption of importation to remain in a case involving marihuana.

This Court recognized in *Leary v. United States,* supra, that marihuana could be grown in bulk in the United States. It was further recognized that the presumption of importation would not be allowed to remain in prosecution under 26 U.S.C. §4744(a) (1). However, in the case at bar, and in view of the decisions of the lower courts, this presumption is being allowed to remain in cases involving importation of marihuana. Although the jury is not in fact instructed that they may presume the importation of marihuana, cases are allowed to reach a jury, which if the contraband involved was gold or any other product not being marihuana,

as a matter of law, the evidence would be ruled insufficient to show importation. It is a difficult thing to point out to this Court that the inherent feeling that all marihuana is Mexican marihuana, is reaching the court room by allowing cases with no evidence whatsoever, circumstantial or direct, of importation. Yet these cases are being allowed to go to a jury who without exception find the importation to exist. Therefore, it would be important to grant certiorari in this case to restate and reaffirm this Court's decision in *Leary* and to set standards of evidence needed as a matter of law to show importation.

3. The decision below raises problems as to the degree of proof now needed by the government in a circumstantial evidence case concerning a crime of conspiracy.

The court in finding sufficient evidence to show a conspiracy relied on the case of *United States v. Falcone*, 1940, 311 U.S. 205, 85 L.Ed. 128, 61 S.Ct. 204, holding that the evidence in this case is, in itself, sufficient to show a conspiracy. The Court should grant certiorari in this case in order to set out, constitutionally, the degree of evidence required in prosecutions for conspiracy. Hundreds of prosecutions across the United States are being brought under the conspiracy statutes and to simply allow a conspiracy to be proved because of a defendant's presence in the company of alleged co-conspirators who are jointly charged with a crime, which concerns passion and prejudice, as the crime of smuggling marihuana necessarily involves, allows the government to prosecute and convict almost anyone associated in any way, with an alleged conspirator of

a crime such as this one. Petitioners would respectfully request that this Court grant certiorari in this case for the reason that the Federal Government, the courts and juries, in general, have made dangerous and unjust inferences from circumstantial evidence in cases involving conspiracy, which is resulting in the conviction of individuals with little or no evidence against them. Prosecutions are being brought continuously for the crime of conspiracy and in most cases such prosecutions could not be brought on the substantive crime itself. It is therefore necessary that this Court grant certiorari in the case at bar in order to review the evidence involved in this case and to standardize the degree of proof required in cases involving conspiracy.

Your petitioners would further point out to this Honorable Court that nowhere in 21 U.S.C. §176(a) is the term "contrary to law" defined. The only provisions in the statute which would allow a potential importer to import marihuana is the wording of the statute which says: "...marihuana which should have been invoiced..." To invoice the marihuana and to declare it therefore, as prescribed by law, would, of necessity, subject the importer to prosecution under State law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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June 3, 1971

CERTIFICATE

I certify that on this the ____ day of June, 1971, I served a true copy of the foregoing Petition for Writ of Certiorari on Mr. Wayne Speck, Assistant United States Attorney, by mailing him a copy by Air Mail Postage Prepaid, to his offices, Federal Courthouse Building, San Antonio, Texas, and another copy on the Solictor General, by mailing him a copy, Air Mail Postage Prepaid, Department of Justice, Washington, D. C.

JOSEPH A. CALAMIA

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29505

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

CRAIG WARNER, APRIL COVEY, SAMUEL L. KRANZTHOR, FRED W. DANIELS, JR., FRIEDA E. EDWARDS, FRANK DANIELS and MICHAEL A. JACOBSON,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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(April 8, 1971)

Before WISDOM, THORNBERRY, and DYER, Circuit Judges.

WISDOM, Circuit Judge: The defendants-appellants — Samuel L. Kranzthor, Fred W. Daniels, Jr., Frieda E. Edwards, Frank Daniels, Michael A. Jacobson, Craig R. Warner, and April L. Covey — were charged with having conspired knowingly and with in-

tent to defraud the United States to import marihuana into the United States contrary to law, in violation of 21 U.S.C. § 176a.[1] Three other persons were also named in the indictment: Richard C. Semple, III, Michael G. Young, and Rodolfo Vasquez.[2] Semple was

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[1] § 176a. Smuggling of marihuana; penalties; evidence; definition of marihuana

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

[2] The counts of the indictment on which the Government elected to proceed charge the following acts:

FIRST COUNT

(21 U.S.C. § 176(a))

That beginning on or about March 2, 1969, and continuously thereafter until on or about March 18, 1969, in the Western District of Texas, and at other places without the jurisdiction of this Court, RICHARD C. SEMPLE III, SAMUEL L. KRANZTHOR, FRED W. DANIELS, JR., FRIEDA E. EDWARDS, FRANK DANIELS, MICHAEL A. JACOBSON, MICHAEL G. YOUNG, CRAIG R. WARNER, RODOLFO VASQUEZ and APRIL L. COVEY conspired, confederated and agreed together and with each other and with other persons to the Grand Jury unknown, knowingly and with intent to defraud the United States, to import and bring into the United States marihuana contrary to law, in violation of 21 U.S.C. § 176(a), and in furtherance of their said conspiracy and to effect its objects, they performed, among others, the following overt acts:

1. On or about March 2, 1969, SAMUEL L. KRANZ-

THOR wrote a letter from the Bel Air Motor Lodge, 1811 North Mesa Street, El Paso, Texas, to Rodolfo "Fito" Vasquez, % Delia's Beauty Shop, Fabens, Texas, and marked the letter 'personal'.

2. On or about March 5, 1969, MICHAEL A. JACOBSON obtained Mexican Tourist Permit No. 952665 and Vehicle Permit No. 066881 covering his 1968 Volkswagen Station Wagon bearing 1969 Arizona License LBH-433 in Nogales, Sonora, Mexico.

3. Prior to March 10, 1969, MICHAEL A. JACOBSON and MICHAEL YOUNG entered Mexico from the United States in MICHAEL A. JACOBSON's 1968 Volkswagen Station Wagon, Arizona license LBH-433.

4. Prior to March 10, 1969, CRAIG R. WARNER and APRIL L. COVEY entered Mexico from the United States in CRAIG R. WARNER's 1959 Volkswagen Station Wagon bearing 1968 Arizona license HSJ-910.

5. Prior to March 15, 1969, FRIEDA E. EDWARDS entered Mexico from the United States in her 1954 Volkswagen sedan bearing 1968 Texas license CLY-80.

6. Prior to March 15, 1969, FRED W. DANIELS, JR. entered Mexico from the United States.

7. From March 13, 1969 through March 15, 1969, CRAIG R. WARNER and APRIL L. COVEY stayed at the Motel Pie de la Sierra, Uruapan, Michoacan, Mexico.

8. On March 18, 1969 at approximately 9:00 a.m., RICHARD C. SEMPLE, III and FRED W. DANIELS, JR., entered the United States from Mexico via the Avenida de las Americas Bridge (Cordova Port of Entry) in a Mexican taxi from Sylvia's Cab Stand in Juarez, Mexico.

9. On March 18, 1969, at approximately 11:30 a.m., FRIEDA E. EDWARDS left the Las Vegas Motel, Juarez, Mexico, in her 1964 Volkswagen sedan, Texas license CYL-80, carrying a large loaded luggage rack covered with a green tarpaulin and secured with cord.

10. On or about March 18, 1969, at approximately 12:00 noon SAMUEL L. KRANZTHOR landed his Tri-Pacer aircraft, Registry No. N1766A, at the Fabens, Texas, Airport.

11. On March 18, 1969, shortly after noon, Rodolfo Vasquez picked SAMUEL L. KRANZTHOR up at the Fabens Airport and drove to his farm south of Fabens, Texas, in his 1966 Chevrolet Pickup Truck bearing 1968 Texas license 8H-3353.

never apprehended and remains a fugitive. The other nine defendants pleaded not guilty and stood trial by jury. At the close of all the evidence the district court granted Young's motion for judgment of acquittal. The jury acquitted Vasquez but convicted the other seven defendants. Kranzthor was also convicted of the substantive offense of knowingly importing marihuana into the United States contrary to law.[3] The district court sentenced Kranzthor to serve two concurrent ten-year terms in a federal penitentiary. The court sentenced Frank Daniels under the Youth Corrections Act, 18 U.S.C. § 5005 et seq. The remaining five defendants were sentenced to serve six-year terms in a federal penitentiary.

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12. On March 18, 1969, sometimes prior to 4:15 p.m., SAMUEL L. KRANZTHOR, RICHARD C. SEMPLE, III, and MICHAEL A. JACOBSON entered the Cafe Monumental in Juarez, Chihuahua, Mexico.

13. On March 18, 1969, at approximately 4:20 p.m., FRANK DANIELS, FRED W. DANIELS, JR., and MICHAEL G. YOUNG, joined MICHAEL A. JACOBSON, SAMUEL L. KRANZTHOR and RICHARD C. SEMPLE, III in the Cafe Monumental in Juarez, Chihuahua, Mexico.

14. On March 18, 1969, at approximately 8:55 p.m., CRAIG R. WARNER and APRIL L. COVVEY left the Riviera Motel in CRAIG R. WARNER's 1959 Volkswagen Station Wagon, Arizona license HSJ-910

THIRD COUNT

(21 U.S.C. § 176(a))

That on or about March 18, 1969, in the Western District of Texas, RICHARD C. SEMPLE, III and SAMUEL L. KRANZTHOR knowingly, with intent to defraud the United States, imported and brought into the United States contrary to law approximately 800 Pounds of Marihuana.

[3] Bert Semple was also charged with having knowingly imported marihuana into the United States contrary to law. See footnote 2 *supra*.

On appeal to this Court four points of error are raised. (1) All of the appellants contend that the district court erred in denying their motions for judgment of acquittal, because the evidence was insufficient to sustain their convictions for conspiracy. (2) Kranzthor contends that the court erred in denying his motion for judgment of acquittal, because the evidence was insufficient to sustain his conviction for the substantive offense. (3) All of the appellants contend that the court erred in admitting the evidence taken from them and their vehicles, because — so they argue — their arrests and the searches of their vehicles were without a warrant or probable cause. (4) The appellants' final contention is that the statute under which they were charged, 21 U.S.C. § 176a, is unconstitutional; because it violates the Fifth Amendment privilege against self-incrimination. We conclude that the judgment of the district court must be affirmed.

I.

The first two contentions are that the Government's evidence is insufficient to support defendants' convictions for conspiracy and Kranzthor's conviction for the substantive offense of illegal importation of marijuana.

On a motion for judgment of acquittal, the test is whether, taking the view most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. *Sanders v. United States*, 5 Cir. 1969, 416 F.2d 194, 196; *Jones v. United States*, 1968, 391 F.2d

273, 274; *Weaver v. United States,* 1 Cir. 1967, 374 F.2d 878, 881. It is true that much of the evidence in this case is circumstantial, and that at one time some courts expressed the view that in criminal cases based on circumstantial evidence a special rule required the district court to grant the motion for acquittal unless the circumstantial evidence excluded every reasonable hypothesis other than that of guilt.[4] The Supreme Court, however, has said that "[c]ircumstantial evidence ... is intrinsically no different from testimonial evidence" and that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *Holland v. United States,* 1954, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150, 166. The same test, therefore, for judging the sufficiency of the evidence should apply whether the evidence is direct or circumstantial. Indeed, that is the prevailing rule in the federal courts today. *See* 2 C. Wright, Federal Practice & Procedure § 467, at 258. To reconcile some older Fifth Circuit cases with the Supreme Court's clear holding in *Holland,* this Court has re-phrased the substantial evidence test: In criminal cases based on circumstantial evidence our task is to determine whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence. *United States v. Andrews,* 5 Cir. 1970, 427 F.2d 539, 540; *Surrett v. United States,* 5 Cir. 1970, 421 F.2d 403, 405. Notwithstanding these differences, which some might term verbalistic, we

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[4] *See, e.g.,* Riggs v. United States, 5 Cir. 1960, 280 F.2d 949, 955; Cuthbert v. United States, 5 Cir. 1960, 278 F.2d 220, 224-25; 2 C. Wright, Federal Practice & Procedure § 467, at 257-58.

are in agreement with our brothers in other circuits that whether the evidence be direct or circumstantial, the matter of the defendant's guilt is for the jury to decide unless the court concludes that the jury must necessarily have had a reasonable doubt. *See* 2 C. Wright, Federal Practice & Procedure § 467, at 259.

Since there were seven defendants indicted and convicted and since the principal question this case presents is whether as to each one the Government's evidence was sufficient to sustain his conviction, in justice to each, a somewhat lengthy discussion of the Government's case is necessary.

At 9:00 a.m. on March 18, 1969, a Mexican taxicab carrying Fred Daniels and Bert Semple entered the United States at the Cordova Bridge in El Paso, Texas. Because both men appeared nervous and United States Customs inspectors had information that Daniels was suspected of smuggling, the inspectors at El Paso detained Daniels and Semple momentarily and searched them. The search revealed nothing but the inspectors asked the Mexican taxi driver, as they had occasionally done in the past, to report to them after he let off the two men. The driver reported to the inspectors that following the search one of the men had said to him in Spanish, "I thought those inspectors were real smart." He added that it had been useless for the officials to search them since they were not bringing anything back into the country: "What we had, we left in Mexico." The men told the driver that someone might be following them and gave him a tip of four dollars on a ride that cost only four dollars "not to

say where I had left them". The inspectors then relayed this information to the Special Agent in charge of Customs in the El Paso area, who in turn alerted the other Special Agents.

About an hour after Fred Daniels and Semple entered the United States, the alerted agents observed Frank Daniels, Fred's brother, and another person driving south toward Mexico in Frank's light blue Volkswagen bus. At 10:30 agents dispatched to Juarez, Mexico, saw Frieda Daniels Edwards, sister of Fred and Frank Daniels, accompanied by a passenger, driving her dark blue Volkswagen sedan with a large luggage carrier on top. She was leaving the Las Vegas Motel in Juarez. The carrier appeared to be loaded and was covered with a green tarpaulin. Two men in Frank Daniels's light blue Volkswagen bus were following Frieda's car. Both vehicles stopped at the La-Cuesta Restaurant in Juarez. A few minutes later the agents saw Frieda leave the restaurant in her car, but it no longer had the luggage carrier on top. Still without her luggage carrier, Frieda entered the United States at the Santa Fe Street Bridge in El Paso at 1:50 p.m.

The agents attempted to follow Frank Daniels's bus, but soon lost sight of it. At 3:00, however, the Agents spotted it at the Maxfim Restaurant in Juarez. A few minutes later they observed the bus leave the restaurant and drive across the street to the Riviera Motel. There the agents also observed a white-over-beige Volkswagen bus, later determined to belong to Craig Warner and occupied by Warner and April Covey.

At 4:45 Frank Daniels, Fred Daniels, and Michael Young left the Riviera Motel in Frank Daniels's bus and went next door to the Cafe Monumental. They went inside the cafe and seated themselves at a table at which Bert Semple, Sam Kranzthor, and Michael Jacobson were already sitting. As the agents sat outside the cafe, they noticed a 1966 white Chevrolet pickup truck, Texas license number 8H-3353, parked in the parking lot. Soon Frank Daniels walked out of the cafe, looked inside the white pickup truck, and then walked away.

Neither Craig Warner nor April Covey actually attended the Cafe Monumental meeting. But their Volkswagen bus was at the adjacent hotel. Moreover, Covey's German Shepherd dog, "Steppenwolf" was at the cafe.

In a short while Steppenwolf came trotting up to the agents. As they were feeding the dog, Jacobson came out of the restaurant, said that the dog "belongs to a friend of mine", and took him inside the cafe.

Within a few more minutes all six men left the cafe. Again, as in the cars, they paired off. Jacobson and Young walked with the dog back to the Riviera Motel. Semple and Kranzthor got in the white Chevrolet pickup truck and drove off. Fred and Frank Daniels got in Frank's light blue Volkswagen bus and drove back to the Riviera Motel.

At 6:00, just as it was getting dark, the agents observed Frank Daniels's bus leave the motel. Close behind it was Warner's white-over-beige Volkswagen bus

and Jacobson's white-over-dark-blue Volkswagen bus. Other than the fact that there were two persons in each bus, the agents could not identify the occupants. The Government argues, however, that it is reasonable to infer that the two occupants of each bus were the same persons who had been seen in them earlier in the day and who turned up in them later that night; in other words, Fred and Frank Daniels were in Frank's bus, April Covey and Warner in Warner's bus, and Young and Jacobson in Jacobson's bus.

The buses left Juarez in a southeasterly direction. They all stopped while one got gasoline. They proceeded in tandem down the Mexican highway toward Tres Jacales until they encountered the white pickup truck coming toward them in the opposite direction. The highway parallels the International Boundary between the United States and Mexico. The truck did not appear to be loaded. At the point of their encounter with the truck, at the village of El Millon, the buses made U-turns and followed the truck up a road into an area of sand hills. The four vehicles parked on a hill above the level of the road for about twenty minutes. The Government argues that it was during this rendezvous that the defendants transferred from the buses to the truck the marihuana later found in the truck on the American side of the border.

When the vehicles finally came back down the hill, the white pickup truck went southeast and the three buses northwest, back toward Juarez. Because it was dark and the agents were some distance from the vehicles, they could not tell whether the truck was then loaded.

In any event, the agents followed the Warner and Jacobson buses back to the Riviera Motel in Juarez. There the agents watched the occupants of the two buses take some things out of their buses, straighten out the inside, and then re-load the vehicles. At 8:50 the Warner and Jacobson buses left the Riviera Motel. The agents attempted to follow them, but lost the Warner bus when it made a U-turn in the middle of traffic. They were able to follow the Jacobson bus to the Cordova Bridge, where, after a brief inspection, it entered the United States. At that point the agents could see that the occupants in the bus were two men. Upon crossing the bridge, the Jacobson bus drove to the Papagayo Motel just outside El Paso. There the bus drove into the parking lot and stopped next to a public telephone booth. The Warner bus, which had eluded the agents in Juarez, was already parked at the same spot. The agents maintained surveillance of the two buses until about 10:25. At no time during that interval did the occupants of the two buses (Warner and Covey; Young and Jacobson) ever leave their vehicles; they simply sat there.

At 7:30 agents posted at the Ysleta Bridge saw Frank Daniels's light blue Volkswagen bus cross over into the United States. Although the agents could not see the driver of the bus, they identified the passenger as Fred Daniels. Other agents followed the bus to the home of Frank Daniels's girl fried (so it appears from the record). There the agents observed the bus parked in front of the house and Frank Daniels standing on the porch. By the time the agents had circled the block, the bus was gone. They soon saw it, however, heading northwest toward Frank Daniels's house outside El

Paso. When the agents arrived at the Daniels house, they found Frank Daniels's bus parked in the driveway. Sam Kranzthor was standing next to the bus, apparently starting to get in. In the road in front of the house the white pickup truck was parked.

After the rendezvous of the three buses and the white pickup truck in the area of the sand hills, the Special Agent in charge posted lookouts at each of the bridges in the El Paso area. The white pickup truck was last seen in Mexico shortly after 7:00 p.m. as it headed southeast on Mexican Highway 2. It was next seen at 8:55 on the American side of the border going northwest — the opposite direction — on Interstate Highway 10. The Special Agent in charge testified that the truck did not cross at either of the bridges southeast of Juarez, the direction in which it was last seen heading in Mexico. The record indicates, however, that the Rio Grande can be easily forded in that area; indeed, many automobile tire tracks line the dry creek bed. Therefore, the Government argues, it is reasonable to infer that the truck drove south of the last bridges in the El Paso area, crossed the river, made a U-turn, and headed back toward El Paso.

Following the truck as it drove back toward El Paso, the agents noticed that the truck appeared to be heavily loaded. A green tarpaulin covered the objects that were heaped in the back of the truck. As the truck reached El Paso, one of the agents was able to identify Sam Kranzthor as one of the two occupants of the truck. The agents continued to follow the truck as it drove through El Paso north toward Frank Daniels's house.

Agent Kessler was the first agent to arrive at the Daniels house. As noted above, he found Kranzthor standing in the driveway next to Frank Daniels's bus. The white pickup truck was parked in the road in front of the house. As Agent Kessler placed Kranzthor under arrest, someone fired a shot from the vicinity of the truck. Just as the other agents arrived on the scene, the truck backed up and sped away from the house. Four more shots were fired. The agents quickly found the truck a short distance down the road; it had become mired in the sand, and the driver had abandoned it. The door was open and on the seat was a clear plastic bag containing marihuana. The agents searched the area for the driver of the truck, but found no one.

They then looked into the back end of the truck and discovered 800 pounds of marihuana contained in eight burlap bags and a number of suitcases, duffel bags, and footlockers. The burlap bags bore markings indicating that they had been manufactured in Mexico. The suitcases and footlockers were sitting in Frieda Edwards's luggage carrier, which had been placed on top of the burlap bags. The marihuana was packed in the form of bricks; some of the bricks were wrapped in clear plastic bags. The entire load was secured by pieces of synthetic cord and covered with a green tarpaulin. Inside the truck the agents found Bert Semple's driver's license, a letter from Kranzthor to Rodolfo Vasquez, some Mexican matches and cigarette papers, balance scales marked in kilograms, some men's and women's clothing, and Bible belonging to Fred Daniels.

As soon as Kranzthor was arrested and the truck containing the marihuana seized, the Special Agent in charge instructed his other agents to arrest the suspected conspirators. At 10:25 therefore the agents maintaining surveillance at the Papagayo Motel moved in on the occupants of the Warner and Jacobson buses. Agent Robinson arrested Warner and Covey as they sat in Warner's bus. The agent searched Warner and found pieces of paper on which were written the former address of the Daniels brothers and their telephone number. Inside the Warner bus the agents found some camping equipment and clothing, Steppenwolf, the dog they had fed earlier, marihuana sweepings, a bill for accommodations for two persons from March 13 to March 15 at a motel in Uruapan, Mexico, a bill for repair work done on Warner's bus at Uruapan on March 15, another bill for car repairs at Zacatecas, Mexico, on March 17, an envelope addressed to Warner in care of Frank Daniels at Frank's former residence in El Paso, and a receipt indicating that in Guadalajara on March 10 Covey exchanged $510 for Mexican pesos.

Agent Morgan arrested Young and Jacobson as they sat in Jacobson's bus. In Jacobson's wallet the agents found cards on which were written the telephone numbers of Frank Daniels and Frieda Edwards. Inside Jacobson's bus the agents found camping equipment and clothing, Mexican tequila, a car repair bill from Uruapan, Mexico, dated March 15, a receipt for the exchange of $800 at Uruapan dated March 10, and a large quantity of empty clear plastic bags identical to those discovered in the back of the white pickup truck.

Following their capture of the white pickup truck, the agents returned to Frank Daniels's house, where they observed Fred Daniels, Frank Daniels, and Frank's girl friend get in Frank's bus and start to drive away. The agents quickly halted the bus and arrested the three occupants. Shortly thereafter, the agents spotted Frieda Edwards sitting in her Volkswagen sedan approximately a block north of Frank Daniels's house. She was arrested and taken to the Daniels house. There the Special Agent in charge administered the prescribed *Miranda* warnings to the four persons in custody. A search of Fred Daniels clothing revealed marihuana sweepings. In Frank Daniels's jacket the agents found a set of keys that fitted the locks on the footlockers full of marihuana found in the back of the white pickup truck. A search of Frieda Edwards's Volkswagen sedan disclosed some pieces of cord identical to those used to secure the marihuana in the back of the white pickup truck. In Edwards's car the agents also found a car repair bill from Uruapan, Mexico, dated March 15. The bill was issued to a "Sr. Frece Daniels."

Taken together, the car repair bills, motel bill, and money exchange receipts indicate that Warner, Covey, Jacobson, and Fred Daniels were all in Uruapan, Mexico, on March 15. At the trial Governments agents testified that marihuana grows in prolific quantities in the area around Uruapan. In March 1969 the price of marihuana there was about ten dollars a pound; the price in the United States at the same time was about ninety or one hundred dollars a pound. On the basis of this evidence the Government argues that the above named appellants drove to Uruapan, purchased the 800 pounds

of marihuana, and brought it back to Juarez, where they transferred it on the evening of March 18 to the white pickup truck to be driven across the border.

Later investigation disclosed the fact that the white pickup truck belonged to Rodolfo Vasquez. At the trial Vasquez testified that he lent the truck to Kranzthor on the day before the events here described. The agents also learned that Kranzthor owned a Tripacer single-engine airplane and that he had flown the airplane to various places in Mexico in early March. Searches of Kranzthor's clothing and the floor of the airplane revealed marihuana sweepings.

The appellants argue that the evidence recited here in some detail is insufficient to establish that they conspired to import marihuana into the United States contrary to law and that they committed any overt acts in furtherance of the conspiracy. Kranzthor, who was convicted of the substantive offense of illegal importation, also argues that the Government failed to prove beyond a reasonable doubt that the marihuana was in fact imported and that he imported it. The gist of Kranzthor's argument is that the Government's evidence leaves unaccounted for an hour and forty-five minutes between the time agents in Mexico last saw the white pickup truck and the time agents in the United States first observed the truck on the evening of March 18; during that time period unknown persons could have loaded the marihuana on the truck in the United States. Moreover, the only evidence indicating that Kranzthor imported the marihuana is that he was once seen riding in the loaded truck on the American

side of the border, and as a matter of law his mere presence in the truck is insufficient evidence.

II.

We deal first with the appellants' common contentions. The essential elements of the federal crime of conspiracy, 18 U.S.C. § 371, are an agreement by two or more persons to combine efforts for an illegal purpose and an overt act *by one* in furtherance of the agreement. *United States v. Falcone*, 1940, 311 U.S. 205, 210, 61 S.Ct. 204, 85 L.Ed. 128, 132; *Roberts v. United States*, 5 Cir. 1969, 416 F.2d 1216, 1220; *Nelson v. United States*, 5 Cir. 1969, 415 F.2d 483, 485; *Kirschbaum v. United States*, 8 Cir. 1969, 407 F.2d 562, 565: Since a conspiracy by its very nature is born and clothed in secrecy, the first element of the offense — agreement — is seldom susceptible of direct proof. Proof of the agreement or common purpose therefore must rest upon inferences drawn from relevant and competent circumstantial evidence — ordinarily, the acts and conduct of the conspirators themselves. *United States v. Varelli*, 7 Cir. 1969, 407 F.2d 735, 741; *Miller v. United States*, 9 Cir. 1967, 382 F.2d 583, 586; *Rodriquez v. United States*, 5 Cir. 1967, 373 F.2d 17, 18; *Jordan v. United States*, 10 Cir. 1966, 370 F.2d 126, 128; *Dennis v. United States*, 10 Cir. 1962, 302 F.2d 5, 11. Once the existence of the agreement or common scheme of conspiracy is shown, however, "*slight* evidence" is all that is required to connect a particular defendant with the conspiracy. *United States v. Jones*, 9 Cir. 1970, 425 F.2d 1048, 1951; *United States v. Knight*, 9 Cir. 1969, 416 F.2d 1181, 1184; *Lopez v. United States*,

5 Cir. 1969, 414 F.2d 909, 911. And once it is shown that a particular defendant joined the conspiracy, the acts of his co-conspirators done in furtherance of the conspiracy are attributable to him and he becomes equally liable for them. *Grimes v. United States*, 5 Cir. 1967, 379 F.2d 791, 795; *Hernandez v. United States*, 9 Cir. 1962, 300 F.2d 114, 121.

With these principles in mind, we hold that from the evidence presented a reasonably-minded jury could conclude beyond a reasonable doubt that the defendants entered into a common scheme to import marihuana into the United States contrary to law and that the overt acts proved were in furtherance of that scheme.

In response to Kranzthor's individual contentions, the Government argues that the evidence is sufficient to allow the jury to conclude beyond a reasonable doubt that the marihuana was in fact imported and that Kranzthor imported it. First, the evidence showed that in early March 1969 at least Warner, Covey, Jacobson, and Fred Daniels drove to Uruapan, Mexico, where marihuana is known to grow abundantly. While still in the interior of Mexico but shortly before returning to the United States, Covey and Jacobson exchanged over $1,300 for Mexican pesos. Inside their vehicles, however, the Customs agents found camping gear and an inexpensive motel bill, which, the Government argues, indicates that the travelers were living frugally. Moreover, the only significant purchase found in any of the vehicles was the 800 pounds of marihuana. That quantity of marihuana would have cost $8,000 in Uruapan, $80,000 in the United States.

Second, there was the evidence of Frieda Edwards's luggage carrier. On the morning of March 18 agents in Mexco had observed Frieda driving her Volkswagen sedan with the luggage carrier on top; the luggage carrier was then loaded, but with what the agents could not tell. While still in Mexico, the luggage carrier disappeared; Frieda crossed the border in the early afternoon without it. The agents next saw the luggage carrier late that night in the back of the white pick-up truck. The luggage carrier was then loaded with 230 pounds of marihuana.

Third, the evidence concerning the route taken by the white pickup truck on the evening of March 18 seems inconsistent with the hypothesis of innocence. Agents in Mexico last saw the truck on Mexican Highway 2 heading southeast, away from Juarez. The truck did not pass through either of the ports of entry just southeast of Juarez. The evidence revealed, however, that the Rio Grande in that area is often a dry creek bed, which cars and trucks can easily cross. Agents in the United States spotted the truck approximately one hour and forty-five minutes after it had last been seen in Mexico. At that time it was still southeast of El Paso-Juarez; however, it was then heading northwest, back toward El Paso. In contrast to its appearance earlier in the day, it was then heavily loaded. The agents followed the truck to the Daniels residence north of El Paso where they found 800 pounds of marihuana in the back of the truck. The Government argues that a truck not carrying contraband would not have taken that circuitous route but would have crossed the border at the most convenient point, either the Fabens or Ysleta ports of entry.

Finally, the Government argues that the physical condition of the marihuana and the items seized with the marihuana indicate its foreign origin. Eight hundred pounds is — in this country — a large and expensive quantity of marihuana. Government witnesses testified that they had never seen or heard of a field of marihuana on the American side of the border capable of producing that much marihuana. We have already noted the vastly cheaper price of that much marihuana in Mexico. Most of the marihuana was packed in bricks, a form in which marihuana is frequently smuggled into this country. Some of the marihuana was contained in burlap bags, the markings on which indicate that they had been manufactured in Mexico. The balance scales found in the back of the truck were marked off in kilograms rather than pounds, the analogous American unit.

To establish that Kranzthor had illegally imported the marihuana, the Government proved that on the day before the events in question Kranzthor borrowed the white pickup truck from Rodolfo Vasquez. On March 18 agents in Mexico observed Kranzthor meet with Bert Semple, Jacobson, Young, Fred Daniels, and Frank Daniels at the Cafe Monumental. When the meeting broke up, Kranzthor got in the truck with Semple and drove away. About one hour and forty-five minutes after the truck was last seen in Mexico, agents observed Kranzthor riding in the truck on the American side of the border. The truck was heavily loaded. The agents followed the truck to Frank Daniels's house where they arrested Kranzthor. A search of the truck which Kranzthor had procured and in which he was

seen riding revealed 800 pounds of marihuana. When added to the circumstances indicating illegal importation of the marihuana, the Government argues, this evidence is sufficient to allow a jury to conclude beyond a reasonable doubt that Kranzthor imported it.

As we indicated at the outset of this opinion, in a criminal case in which the jury has rendered a verdict of guilty, the appellate court must sustain that verdict if there is substantial evidence, taking the view most favorable to the Government, to support it. *See Glasser v. United States,* 1942, 315 U. S. 60, 62 S.Ct. 457, 86 L.Ed. 680. This means that we must accept as established all reasonable inferences that tend to support the action of the jury, and any conflicts in the evidence must be resolved in favor of the jury verdict. *Gordon v. United States,* 5 Cir. 1971, F.2d [No. 25,973, January 13, 1971]; *United States v. Francisco,* 8 Cir. 1969, 410 F.2d 1283, 1288. We hold therefore that from the evidence presented a reasonably-minded jury could conclude beyond a reasonable doubt that the marihuana in this case was imported and that Kranzthor imported it. In other words, reasonable minds could conclude that the Government's evidence is inconsistent with the hypothesis of Kranzthor's innocence. *See United States v. Andrews,* 5 Cir. 1970, 427 F.2d 539, 540; *Surrett v. United States,* 5 Cir. 1970, 421 F.2d 403, 405.

III.

The appellants next contend that the district court should have suppressed all evidence taken from them

and their vehicles for the reason that their individual arrests, searches, and the searches of their vehicles were without warrants or probable cause in violation of the Fourth Amendment. It is undisputed that at the time of their arrests and the searches of their vehicles the Customs agents had neither an arrest warrant nor a search warrant. We hold, however, that the evidence taken from them and their vehicles was properly admitted as the fruits of valid border searches.

Recognizing the peculiar and difficult problems involved in effectively policing our extensive national boundaries, Congress has granted Customs officials broad authority to stop and search any person or vehicle suspected of carrying merchandise illegally imported into the United States and to seize any merchandise that the officials have reasonable cause to believe to have been illegally imported. 18 U.S.C. § 482. *See United States v. Glaziou*, 2 Cir. 1968, 402 F.2d 8, 12; *Thomas v. United States*, 5 Cir. 1967, 372 F.2d 252, 254; *King v. United States*, 9 Cir. 1965, 348 F.2d 814, 816-18. Federal courts have unanimously interpreted this Congressional grant to mean that Customs agents may stop a person and conduct a "border search" without first procuring a search warrant or even having probable cause to believe that the person has committed a crime. In the parlance of these decisions, the agents' "mere suspicion" of possible illegal activity is enough cause to justify a border search. *E.g., United States v. Hill*, 5 Cir. 1970, 430 F.2d 129, 130-131; *United States v. Glaziou, supra; Morales v. United States*, 5 Cir. 1967, 378 F.2d 187, 189; *Alexander v. United States*, 9 Cir. 1966, 362 F.2d 379,

382. Border searches are of course not exempt from the Fourth Amendment requirement that searches and seizures be reasonable. *United States v. Glaziou, supra; United States v. McGlone,* 4 Cir. 1968, 394 F.2d 75, 77; *Marsh v. United States,* 5 Cir. 1965, 344 F.2d 317, 324. *See also* Note, Border Searches and the Fourth Amendment, 77 Yale L. J. 1007 (1968); ALI, A Model Code of Pre-Arraignment Procedure § 55 6.02 (Tent. Draft No. 3, April 24, 1970). Yet what is reasonable within the meaning of the Fourth Amendment must depend upon the facts and circumstances of the particular case. *Cooper v. California,* 1967, 386 U.S. 58, 59, 87 S.Ct. 788, 790, 17 L.Ed.2d 730; *United States v. Glaziou, supra; United States v. McGlone, supra.* And a border search is not unreasonable simply because it is made without probable cause. *Marsh v. United States, supra.* Indeed, many searches that would be unreasonable if conducted by police officers in the ordinary case are nevertheless reasonable if conducted by Customs agents in lawful pursuit of illegal imports. *See Thomas v. United States, supra; Alexander v. United States, supra.*

Not only is the Customs agents' right to conduct a border search broad, but also the term "border" is itself elastic. *United States v. Glaziou, supra; Marsh v. United States, supra.* The "border" includes not only the actual border crossing points but also a reasonable extended geographic area in the immediate vicinity of the crossing point. *United States v. Glaziou, supra.* The "right to arrest by Customs' agents doesn't cease simply because the suspect may get his foot across on this side of bridge . . . it extends to the immediate

area." *Marsh v. United States, supra.* Moreover, simply because Customs agents inspected a person or his vehicle at the crossing point does not mean that they may not conduct a second border search within the immediate vicinity of the crossing point: a person is not immune from further examination by Customs agents "merely because he 'may momentarily escape detection and pass safely through the first Custom's check.'" *Thomas v. United States, supra; see also Morales v. United States, supra.* On the other hand, the Supreme Court long ago recognized that once a traveler's entry into the country becomes complete, he is entitled to the complete protection of the Fourth Amendment:

> those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Carroll v. United States, 1925, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543; *see also Thomas v. United States, supra; Marsh v. United States, supra:* Therefore when Customs agents choose to conduct a border search outside the immediate vicinity of a border crossing point, the legality of the search will usually depend upon such factors as the distance of the search from the crossing point, the time elapsed since crossing, and the circumstances upon which the agents base their sus-

picions. *McGlone v. United States, supra; Alexander v. United States, supra; Marsh v. United States, supra.*

We have already recited in some detail the surveillance activities of the El Paso area Customs agents on March 18, 1969. From this evidence we conclude that by late that evening the agents had reasonable cause to suspect that the appellants, their vehicles, and the white pickup truck might be in possession of merchandise that had been imported into the United States contrary to law. A border search was clearly in order. We further hold that the agents acted reasonably in following the appellants in their vehicles to their respective destinations in the El Paso area and there searching their persons and their vehicles for contraband. It necessarily follows then that the district court did not err in denying the appellants' motion to suppress the evidence.

Since we have concluded that the evidence taken from the appellants and their vehicles was properly admitted as the fruits of a valid border search, we need not decide whether the evidence might also be admissible as the products of searches incident to lawful arrests, and we express no opinion on that issue.

IV.

The appellants' final argument is that the statute under which they were charged, 21 U.S.C. § 176a, is unconstitutional for the reason that the declaration and invoicing requirements violate the appellants' Fifth Amendment privilege against self-incrimination.

This Court has recently considered this issue in *Walden v. United States,* 5 Cir. 1969, 417 F.2d 698. There we held in the face of a similar contention that the declaration and invoicing requirements of the statute were not unconstitutional. The Ninth Circuit has reached the same conclusion. *See United States v. Avey,* 9 Cir. 1970, 428 F.2d 1159, 1160; *United States v. Vansant,* 9 Cir. 1970, 423 F.2d 620. Moreover, we have reaffirmed our decision in *Walden* on at least four different occasions. *See United States v. Johnson,* 5 Cir. 1971, F.2d [No. 29,471, March 16, 1971]; *United States v. Hudson,* 5 Cir. 1970, 431 F.2d 468, 469; *United States v. Candanoza,* 5 Cir. 1970, 431 F.2d 421, 423-24; *United States v. Houle,* 5 Cir. 1970, 428 F.2d 816, 818.

Therefore, for the reasons set out above, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29505

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CRAIG WARNER, APRIL COVEY, SAMUEL L. KRANZTHOR, FRED W. DANIELS, JR., FRIEDA E. EDWARDS, FRANK DANIELS and MICHAEL A. JACOBSON,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Apr. 8, 1971, 5 Cir., 1971, ____ F.2d ____).

(May 10, 1971)

Before WISDOM, THORNBERRY, and DYER,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29505

D. C. Docket No. EP-69-CR-724

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

CRAIG WARNER, APRIL COVEY, SAMUEL L. KRANZTHOR, FRED W. DANIELS, JR., FRIEDA E. EDWARDS, FRANK DANIELS and MICHAEL A. JACOBSON,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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Before WISDOM, THORNBERRY, and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate: April 8, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1799

CRAIG WARNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of conspiracy to import marijuana into the United States, in violation of 21 U.S.C. 176a. In addition petitioner Kranzthor was convicted of a substantive violation of that section. Kranzthor was sentenced to two concurrent ten-year terms of imprisonment. Frank Daniels was sentenced under the Youth Corrections Act (18 U.S.C. 5005, et seq.). The other five petitioners were all sentenced to six years' imprisonment.

The facts of this case, which involve the smuggling of 800 pounds of marijuana into the United States from Mexico, are set out in full in the opinion of the court below, on which we rely. As the court below held, these facts amply support the jury's verdict.

Although 21 U.S.C. 176a requires importers of marijuana to declare that fact at the customs station; that requirement does not have the Fifth Amendment infirmities found in such cases as *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. If a declaration is made, that declaration leads only to seizure of the marijuana at the border and not to incrimination under state or federal law, only an importation without declaration is an offense. *Walden* v. *United States*, 417 F. 2d 698 (C.A. 5). *United States* v. *Houle*, 428 F. 2d 816 (C.A. 5), certiorari denied, 400 U.S. 882; *Witt* v. *United States*, 413 F. 2d 303 (C.A. 9), certiorari denied, 396 U.S. 932; *United States* v. *DePolanco*, 422 F. 2d 1304 (C.A. 9); *United States* v. *Ashbrook*, 433 F. 2d 988 (C.A. 9), certiorari denied, March 1, 1971 (No. 1055 this Term).

Petitioners have no cause for complaint about the presumption regarding the origin of marijuana which this court struck down in *Leary* v. *United States*, 395 U.S. 6. As they appear to admit, the presumption was not used in this case (Pet. p. 14-15), and there was ample evidence of the Mexican origin of the marijuana here involved.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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